APPEAL NO. 021491
FILED JULY 26, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 1, 2002. The hearing officer held that the respondent (claimant) sustained a repetitive trauma injury with a date of injury of _____, and was within the course and scope of employment (and did not deviate from the course and scope of her employment) during the activity giving rise to the injury. The hearing officer further held that the claimant had disability from her injury from _____, through May 1, 2002.

The appellant (carrier) has appealed and asserts that the injury was not compensable because the claimant violated an express safety order. The carrier further notes the lack of evidence to establish a repetitive trauma injury, or disability. The claimant responds by distinguishing two cases cited by the carrier and pointing to the evidence supporting the decision.

DECISION

We affirm the hearing officer's decision.

We must first commend each of the parties for filing well-argued and thoughtful briefs in support of their positions. Review of the case has been greatly assisted by appellate documents that are, unfortunately, the exception rather than the rule in these appeals.

As we have frequently stated, a hearing officer's factual determinations should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). It was ultimately for the trier of fact to determine whether the testimony, documents, and facts presented would support inferences that the claimant was in the course and scope of employment and was injured by activities at work. While the carrier's attorney has correctly cited concerns expressed by the Appeals Panel in past cases about the quality of evidence needed to establish repetitive and traumatic activities at work, we cannot agree that in this case the record is so devoid of such details that it cannot support the determinations made by the hearing officer. Recitations of the history given by the claimant and her doctor were consistent; they differed from the supervisor's statement,

but this was a conflict to be resolved by the hearing officer. As testified to by the claimant's treating doctor, the duration and nature of activities that are argued to be cumulative and traumatic necessarily varies with the type of activity and the condition of the employee, and it was also for the hearing officer to determine if the activities were "repetitive enough."

A doctor's opinion as to causation is not excludable from any consideration simply because it is based upon the history given by an injured worker; it is only when such history is divergent from the facts of the case otherwise developed that it may be found insufficient to support a favorable finding. *See* Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.).

Likewise, the hearing officer did not err by finding that the claimant was acting within the course and scope of her employment when she was injured. The hearing officer's decision discusses the considerations she made in evaluating whether a prohibition on use of the meat slicer precluded the claimant's ability to claim a work-related injury. There was no evidence that her injury related exclusively to her meat cutter use after she was prohibited from its use (the prohibition occurring about one month after she began employment, and two weeks before she left). Most especially, in light of the Texas Supreme Court's affirmation of the doctrine of liberal construction of the 1989 Act in Albertson's, Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999), a determination that the rules violation was of such magnitude to remove the worker from the course and scope of employment was not compelled in this case.

The determination on disability is more problematic. There is little dispute that the claimant received unemployment compensation benefits for a portion of the time for which she sought disability. She explained that she was able to work, but at the very lightest level, and that when taken off work entirely by her doctor in spring 2002, she went off unemployment compensation. Her treating doctor's testimony supported disability. As in the occurrence of an injury, the determination about disability should not be set aside because different inferences could be drawn from the same evidence.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We therefore affirm the decision and order.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Roy L. Warren
Appeals Judge